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No. 85-938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EDWARD ROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

BEST AVAILABLE COPY

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court properly held that no material or exculpatory evidence was withheld from defendant.

II.

Whether the People's evidence proved defendant guilty of murder beyond a reasonable doubt where the hypothesis of suicide was patently unreasonable.

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COURT OF ILLINOIS, FIRST DISTRICT

OPINION BELOW

The order of the Appellate Court of Illinois, First District, reversing and remanding the trial court's decision, was issued as a published opinion on March 12, 1983. The Illinois Supreme Court denied Petitioner's Appeal as of Right and Leave to Appeal on October 2, 1985.

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for Writ of Certiorari. However, as treated more fully within the following argument, the respondent believes that the petition has failed to show any good reason for this Court to exercise jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

Defendant was convicted of the murder of his ex-wife Betty Ross and senteced to 30 years imprisonment. The facts as they relate to this action have been set forth in the Petition for Writ of Certiorari and in the Appellate Court opinion attached to that Petition. Thus, pursuant to Supreme Court Rules they will not be repeated here.

I.

NO MATERIAL OR EXCULPATORY EVIDENCE WAS WITHHELD FROM DEFENDANT BY THE PEOPLE AND ANY FAILURE TO COLLECT FURTHER EVIDENCE IS EXPLAINED BY THE GOOD FAITH DETERMINATION BY THE POLICE THAT COLLECTION OF SUCH EVIDENCE WAS NEITHER FEASIBLE NOR PROBATIVE OF DEFENDANT'S GUILT OR INNOCENCE.

Defendant contends that he was denied due process of law because the People failed to preserve material evidence. The People maintain that no evidence of a material or exculpatory nature was withheld from defendant by the People and any failure to collect further, only arguably relevant evidence is explained by the good faith determination by the police that collection of such evidence was neither feasible nor probative of defendant's guilt.

The Due Process Clause of the Fourteenth Amendment requires the People to disclose to the accused in a criminal case evidence that is material either to guilt or punishment. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1969). Whatever duty the Constitution imposes on the States to preserve and disclose evidence is limited to evidence that might be expected to play a significant role in the defense of the accused. In other words, the evidence must both possess an exculpatory value that is apparent before the evidence is destroyed and it must also be of such a nature that the accused could not obtain comparable evidence by reasonably available means. California v. Trombetta, 104 S.Ct. 2528 (1984). The duty of the State to

disclose evidence to a defendant first attaches when the State has first gathered and taken possession of the evidence of a crime so that vital evidence is not destroyed before prosecution begins or before a defendant hears of the existence of certain evidence. People v. McDowell, 121 Ill. App. 3d 491, 459 N.E.2d 1018 (1st Dist. 1984).

Although defendant phrases his petition in terms of the rule announced in Brady v. Maryland that the People must preserve and disclose evidence exculpatory to the defendant, when his petition is analyzed he is actually asking for a new rule which would require the People to take affirmative steps to collect and to preserve evidence which could be exculpatory. However, such a theory is not the law. Still, defendant applies this rule to the

case at hand when he complains of the "failure" of the police to test for gunshot residue on the hands of defendant and Betty Ross. Officer Dan Quealy, an evidence technician for the Cook County Sheriff's Police, was in charge of evidence collection at the crime scene in the case at hand. When Quealy arrived on the scene, defendant had already departed for the hospital so he had no opportunity to test defendant's hand for gunshot residue. (R. 804) At this time Betty was being administered to by the paramedics. (R. 805) Betty was shot in the left temple so if suicide was to be a hypothesis it only would have made sense to test for gunshot residue on her left hand. But, Quealy noticed that Betty's left hand was contaminated by blood, by adhesive tape applied by the paramedics and by contact with

the carpet. (R. 936-938) Quealy therefore made the determination that any residue tests would not have produced any meaningful results. (R. 951) The fact that a laboratory scientist without criminal field experience testified on behalf of defendant that Quealy's determination may have been mistaken in basis does not alter the fact that Quealy's opinion was formulated in a good faith on-the-spot situation. As in Trombetta the record here "contains no allegation of official animus toward respondents or of a conscious effort to suppress exculpatory evidence." California v. Trombetta, 104 S.Ct. at 2534. Furthermore, it is by no means clear that the gunshot residue tests would have revealed exculpatory evidence. To the contrary, given the extensive evidence of defendant's guilt in this case, it is clear that the

tests would have been inculpatory rather than exculpatory. As in Trombetta there is no reason to believe that the authorities here were out to get defendant so that they intentionally failed to take the tests which would have solved the case because such tests might show that Betty killed herself. Instead, the investigators simply decided residue tests were infeasible and therefore did not take them.

II.

DEFENDANT WAS PROVEN GUILTY BEYOND ANY REASONABLE DOUBT OF MURDER WHERE THE HYPOTHESIS OF SUICIDE WAS PATIENTLY UNREASONABLE.

A review of the facts in the case at hand demonstrates conclusively that the only reasonable explanation for Betty Ross' death is that she was murdered by defendant. As a starting point it is clear that Betty Ross died as a result of a single bullet to the head. (R. 488) Expert medical testimony demonstrated that Betty's wound was a contact wound caused by the gun being placed directly against her left temple and fired into her brain. (R. 481) Although Dr. Choi, the medical expert, could not conclusively state that Betty could not have walked after the shot to the head it

was far more likely that Betty collapsed where she was shot, fell immediately into a comatose state and died very shortly thereafter.

It is undisputed that Betty was in defendant's apartment when killed and was actually killed by defendant's gun. It is also undisputed that Betty and defendant were alone together when the shooting occurred and that no third party was involved in this crime. Thus, only two explanations for Betty's death are conceivable, either she was killed by defendant or she killed herself.

After picking up Betty from the airport and driving to his apartment defendant and Betty had sexual relations. (R. 1544) The room was in total darkness since defendant could not sleep in a lighted room and therefore had blocked out all light

from the window. (R. 1544-1545) After intercourse defendant washed up, put on his pajamas and came back to lie down on the north side of the bed. (R. 1546-1547) On the day of the incident defendant admitted to Cook County Sheriff Investigator Lawrence Troka that he had been arguing with Betty over remarriage immediately prior to the shooting. (R. 129) Likewise, defendant stated to Investigator Kraut on the same day that he and Betty had had a fight. (R. 562) Defendant lay down in the bed but did not fall asleep. (R. 1623) As defendant was lying in bed he heard an "explosion." (R. 1546) Defendant claims he rolled out of bed and landed on all fours on the north side of the bed, he took two steps to get vertical and headed down the hallway leading to the front door. (R. 1546-47) Defendant then heard a second

"explosion" and returned to the bedroom where he turned on the closet light to reveal Betty lying on the floor at the south side of the bed with a bullet hole in her head. (R. 129) Defendant picked up the telephone from the nightstand, called the operator and "I (defendant) said there was a shooting." (R. 1549) Defendant left the telephone off the hook and claimed he ran down the hall to open the front door for the paramedics who would soon arrive. (R. 1549-50)

When the police and paramedics arrived defendant was ushered into a second bedroom where he was questioned. (R. 60) Until defendant was removed into this room he had not noticed that he had been shot in the right thigh and had no idea exactly when he might have been shot. (R. 1556, 1640) After receiving and understanding his

Miranda rights defendant was first interviewed by Officer Winek. Defendant, when asked if he had shot Betty, answered "No." (R. 62-63) When asked if Betty had shot him, defendant replied, "I don't know." (R. 62-63) Minutes later Investigator Kraut asked defendant if he shot Betty and was told "No, I loved her", but when asked if Betty had shot him, defendant answered "I won't answer that." (R. 563) When asked if Betty could handle guns defendant replied "No, she was afraid of guns." (R. 563) To Kraut's questions of whether Betty had shot herself or whether defendant had shot himself defendant answered, "I won't answer that" to both. (R. 563) Kraut then asked defendant how the shooting occurred and was told "I don't know." (R. 564)

A closer examination of defendant's tale when compared with other evidence

adduced at trial reveals its inherent implausibility. Here defendant is clearly a man who is very fond of guns. Defendant had a loaded revolver in his nightstand next to his bed. In his second bedroom defendant had shotguns and large quantities of extra ammunition. (R. 64) Defendant was an expert marksman with numerous shooting awards. In spite of this familiarity with guns, indeed, this love of guns, defendant, upon hearing gunshots in his own bedroom, states that he only heard an "explosion." It is patently implausible that a man with such very extensive firearm experience should confuse a gunshot with an explosion.

The most basic refutation of suicide is that Betty Ross was right handed but shot in the left temple. (R. 203) According to a study of suicide cases in-

troduced by defendant's own expert Joseph Nicol 92%. of the right-handed suicide victims in the study shot themselves in the right sides and while the number of left-handers in the study was too small to be statistically significant all five of the left-handed subjects in the sample shot themselves in the left side. (R. 1481-83) Furthermore, Betty was missing the ring-finger on her left hand due to an accident several years earlier. (R. 203) Common sense and statistics indicate that right-handed suicides shoot themselves in the right side of the head. It is clearly unreasonable to suggest that a person who phones, writes, throws, files in short does everything with her right hand will pick up a gun with her left hand, a hand missing a finger, and having never shot a gun, shoot herself in the head with that hand. At

trial defendant attempted to explain that Betty was familiar with the murder weapon previous to the incident. According to defendant's story, in July or September of 1981 defendant and Betty drove to the St. Charles Gun Club in Elburn, Illinois, over half an hour from his home to test out his new gun which had never been fired. (R. 1560) The road into the club was about ½ mile in length and lined with cornfields. (R. 1660-61) About midway along that road defendant stopped the car, took the gun out of its case, handed the gun to Betty who fired two shots into the cornfield to test the gun out. (R. 1661) This episode conveniently dispels the notion that Betty was afraid of guns. Furthermore, it was the only evidence whatsoever introduced at trial that Betty had ever fired a gun. Unfortunately for defendant the story is

inherently implausible. Why would a couple drive all the way to Elburn to test shoot a gun, then stop in the very driveway of the club and fire only two shots into a cornfield? Why would an experienced marksman shoot into an empty cornfield at all? Indeed, the trial court found the story inherently unbelievable for those reasons as did the Appellate Court. (Deft. Br. Appendix A-10)

Defendant's telephone conversation with Betty's former husband George Nuter casts a further shadow over defendant's credibility. Nuter testified at trial that he received a telephone call from defendant a day or two after Betty's death regarding burial arrangements. (R. 647-48) After a heated discussion about this subject Nuter asked defendant why he killed Betty and defendant replied "I don't know, I don't

know." (R. 648) Nuter then asked defendant "You pulled the trigger didn't you? You did kill her?" and defendant responded "I know. I know." (R. 648) The conversation then degenerated into name-calling and then terminated. (R. 648) Commenting on this exchange at trial defendant made the curious statement that "I have heard the testimony here so I mean I have to answer accordingly" and explained that as Nuter went into a tirade he did indeed answer "I know. I know." (R. 1568) Clearly defendant has made an inculpatory admission and his comment at trial indicated that he wished he could get around it but could not.

Defendant and Betty Ross, in the course of their relationship, were beset by troubles, jealousies and arguments. First married to each other around 1973 they were

divorced in 1976. (R. 158) Remarried a month later they were divorced again in 1978. (R. 1502) Defendant and Betty saw each other off and on in varying degrees of seriousness between 1978 and 1981. As recently as October 3 of 1981, a month before Betty's death, they had a major argument after which they engaged in yet another temporary cessation of the relationship. (R. 1523) At trial numerous letters were produced which showed that Betty Ross was afraid of defendant, that his insecurity and jealousy was disturbing her. (S. R. 8) Letters from defendant to Betty clearly indicated that it was defendant not Betty who insisted on reconciliation.

Contrary to defendant's assertions, there was no indication that Betty was suicidal or depressed prior to her death.

Indeed, those friends and relatives who testified at trial stated that Betty was very happy and optimistic. (R. 685, 215-216) Her letters indicated likewise. Finally, Betty was undergoing treatment for allergy not psychiatric problems in the spring prior to her death. (R. 1203) Betty was simply not suicidal.

Defendant also places heavy emphasis on the theory that the other shots fired into the floor were "hesitation shots" commonly found in suicide attempts. Once again, defendant has raised an issue on appeal for which he introduced no evidence at trial. Furthermore, given defendant's construction of the facts any hesitation shots could not have been found anywhere at the walls or ceiling and not in the floor.

In his petition defendant claims that the fact that Betty survived the shot for a

period of time lends credibility to his suicide hypothesis. The theory behind this statement is that if defendant truly wanted to kill Betty he would have fired more than one shot into her head to make sure she was dead. To support this theory defendant again impermissibly relies on evidence from a treatise on homicide investigations which was not admitted at trial. Furthermore, if defendant had shot Betty more than once it would have been quite difficult for him to claim that Betty killed herself. Since Betty was killed in defendant's apartment, with defendant's gun, his only chance of escaping liability for this crime was to make it look as if Betty killed herself and this story could not be maintained if Betty had more than one bullet hole in her head.

Interestingly, defendant's gun was recovered at the crime scene and dusted for

fingerprints but no prints were raised from the gun. Once again defendant in his petition introduces evidence not introduced at trial to the effect that a properly maintained gun will often have a light coat of oil over its metallic parts to prevent rust, and therefore prohibit raising of prints. Notwithstanding defendant's failure to argue this issue at trial, his argument fails by its very terms since no prints, not even partial prints, were recovered from the handle of the gun which was not made of metal and therefore not covered with oil to prevent rust. The lack of even partial prints can only be explained by the fact that the gun was wiped off after being fired and of course defendant was the only person alive who could have wiped off the gun.

The basic rule of law expounded in In re Winship, 397 U.S. 358 (1970), simply

requires that defendants be proven guilty beyond any reasonable doubt. Here, an experienced trial judge with the opportunity to observe the witnesses and the evidence concluded that defendant was guilty beyond any reasonable doubt. This judgment was unamiously affirmed by the appellate court after careful examination of the record and arguments. There was, in shot, no shifting of the burden of proof and defendant was properly convicted of murder.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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